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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-447

ALLEGHENY AIRLINES, INC.,

Petitioner,

v.

LEE LEMAY, as Administrator of the Estate of Robert W. Carey, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Allegheny Airlines, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 2, 1971.

Opinions Below

The opinion of the Court of Appeals [not yet reported], appears in Appendix B hereto. The opinions of the United States District Court for the Southern District of Indiana [not yet reported], appear in Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 2, 1971. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a transferee District Court judgment dismissing a third-party complaint served within its territorial jurisdiction during proceedings under the Multi-District Litigation Act, 28 U.S.C. § 1407, is final and appealable when there will be no further opportunity for the third-party plaintiff to serve its third-party complaint in any other forum and any ultimate appeal must be pursued in six Circuit Courts of Appeals?

2. Whether the territorial jurisdiction of a transferee court in multi-district litigation is circumscribed to that of the transferor court for the purpose of determining its jurisdiction over third-party defendants?

Statutes Involved

The statutory provisions involved are Title 28 of the United States Code, §§ 1291, 1292(b) and 1407, and Federal Rules of Civil Procedure 14 and 54(b). They are printed in Appendix A, *infra.*

Statement of the Case

On September 9, 1969, there occurred a mid-air collision over Fairland, Indiana, between an Allegheny Airlines DC-9 jet aircraft and a Piper Cherokee aircraft being operated by Robert W. Carey. All occupants of both aircraft were killed. Respondent Lee M. LeMay was duly appointed as personal representative of the deceased Robert W. Carey. The Piper Cherokee aircraft was owned by the Forth Corporation, a subsidiary of the Brookside Corporation. At the time of the collision the Allegheny aircraft was receiving air traffic control radar vectors from Merrill T. McCammack, an employee of the Federal Aviation Administration.

Approximately eighty separate wrongful death actions have been commenced to date against various defendants as a result of said mid-air collision. The defendants who have been sued are Allegheny Airlines, Inc., United States of America, Forth Corporation, Brookside Corporation, Lee LeMay as Administrator of the Estate of Robert W. Carey, Merrill T. McCammack, and McDonnell Douglas Corporation; not all, however, are defendants in all of the actions.

Allegheny Airlines has been sued in almost all the actions, with the exception of those cases in which the representatives of Allegheny crew members are plaintiffs. These actions against Allegheny have been commenced in eleven different federal courts. Jurisdiction in all of these federal court actions is based upon 28 U.S.C. § 1332.

On February 10, 1970, The Judicial Panel on Multidistrict Litigation transferred all actions arising out of this mid-air collision to the United States District Court for the Southern District of Indiana, pursuant to Title 28, United States Code, Section 1407(a). *In re Mid-Air Collision Near Fairland, Indiana,* 309 F. Supp. 621 (JPML 1970).

This petition concerns twenty-six of the cases so transferred. All were commenced in jurisdictions other than Indiana. Their distribution is as follows: one (1) in the Eastern District of Kentucky; one (1) in the District of New Jersey; one (1) in the Eastern District of Tennessee; two (2) in the Eastern District of Missouri; one (1) in the Southern District of West Virginia; two (2) in the Eastern District of New York; one (1) in the Northern District of New York; three (3) in the District of Connecticut, and fourteen (14) in the Northern District of Illinois. These courts lie within the jurisdiction of six different Circuit Courts of Appeals.

After the transfer of these twenty-six cases to Indiana, petitioner Allegheny Airlines, Inc., pursuant to Rule 14

of the Federal Rules of Civil Procedure, served a third-party complaint upon Lee LeMay, a citizen of Indiana and a resident of the Southern District of Indiana. Mr. LeMay was not subject to suit in any of the above listed transferor forums. The third-party complaints alleged claims for indemnity and/or contribution in the event petitioner Allegheny Airlines, Inc., was held liable to plaintiffs.

Respondent LeMay filed motions to dismiss the third-party complaints on the ground that the courts in which the actions were pending—i.e., the transferor courts—lacked jurisdiction over his person and that service of the summonses and third-party complaints was insufficient because made beyond the territorial limits of service applicable to the transferor courts. Other grounds were also asserted, but not ruled upon, and are not pertinent to this proceeding.

At a hearing on September 18, 1970, the District Court granted LeMay's motion to dismiss Allegheny's third-party complaint on the ground of improper venue, and requested submission of appropriate orders. Allegheny promptly filed a motion for reconsideration on the ground that the Court had granted LeMay's motion upon a defense (improper venue) that had not been raised by said third-party defendant in his motion papers and which had been waived under Rule 12(g) and (h) of the Federal Rules of Civil Procedure.

On November 18, 1970, the District Court for the Southern District of Indiana entered judgments, Appendix B, in favor of LeMay in these twenty-six cases and dismissed them without prejudice. The basis for these judgments was the assertion that the District Court for the Southern District of Indiana's jurisdiction over cases transferred to it pursuant to 28 U.S.C. § 1407(a) was limited to that of the transferor court because the cases were still pending in the transferor courts. The same judgments found that Allegheny's motion for reconsideration was moot. In addi-

tion, the District Court denied requests by petitioner Allegheny Airlines, Inc., for findings under Rule 54(b) of the Federal Rules of Civil Procedure or, in the alternative, for certification under Title 28, United States Code, Section 1292(b), allowing an immediate appeal of its judgments.

On December 17, 1970, petitioner Allegheny Airlines, Inc., filed notices of appeal in all twenty-six cases to the United States Court of Appeals for the Seventh Circuit, and on January 27, 1971, that court entered an order consolidating all the cases for purposes of appeal.

Respondent LeMay and several plaintiffs moved to dismiss the appeal. Initially, the Circuit Court denied the motion, but subsequently entered an order on its own motion that it had taken the motions to dismiss under advisement by way of reconsideration.

On July 2, 1971, the United States Court of Appeals for the Seventh Circuit granted LeMay's motion upon reconsideration and dismissed the appeals. Appendix B, page 36. The Court of Appeals found that it lacked jurisdiction to consider the appeals because the order of the District Court was not final under 28 U.S.C. § 1291; no Rule 54(b) findings had been made; and there was no certification pursuant to 28 U.S.C. § 1292(b).

REASONS FOR GRANTING THE WRIT

1. The determination of the appealability of a judgment entered by a transferee District Court dismissing a third-party complaint in multidistrict litigation proceedings is an important question of Federal Law, the resolution of which will facilitate the judicial administration of such proceedings.

Multidistrict litigation proceedings under 28 U.S.C. § 1407 are relatively new, the statute having been enacted in 1968. The object of the statute is to bring together in

one District Court for consolidated pre-trial proceedings all parties to multidistrict litigation arising under a common set of facts. 1968 U. S. Code Cong. and Adm. News 1898. This concentration of parties gives all concerned the unique opportunity to discover and resolve common questions of law and fact prior to trial and promotes judicial efficiency.

The instant cases are the first, so far as we are aware, in which a ruling of the transferee court subverts what would appear to be the purpose of the multidistrict litigation proceedings, and in which the Court of Appeals has felt powerless to correct a possible misconception by the District Court.

After transfer of these cases to the United States District Court for the Southern District of Indiana, petitioner was able to implead the respondent, a party whom petitioner believes to be one of the prime wrongdoers in this particular accident. There is no question but that the transferee court under its statutory territorial jurisdiction (28 U.S.C. § 94(b)), could exercise jurisdiction over the respondent; equally, there is no question but that the transferor courts could not have exercised such jurisdiction.

It is presumably one of the purposes of the multidistrict litigation proceedings to ensure that all issues can be disposed of as expeditiously as possible, and it would seem that the bringing of all parties into the litigation would assist in effectuating that purpose.

It is, of course, conceivable, that the District Court was correct in interpreting the statute in such a way that the transferee District Court could not exercise a jurisdiction which would otherwise be undoubted. But this is a question, we submit, which should be determined by a federal appellate court or by this Court. And the decision of the Court of Appeals that the District Court's decision is not appealable to it means that the only review available to

the petitioner here is to await the results of the trials in the transferor courts, and then, if there are verdicts against it in all of those courts, to appeal the dismissal of the third-party complaints to no less than six different Courts of Appeals. Since a novel question is involved, it is unlikely, to say the least, that all six Courts of Appeals will reach the same result; so that, no matter what the results in the Courts of Appeals, it is almost inevitable that the question will reach this Court—after six separate appeals.

The general rule controlling appealability of District Court orders is that only "final decisions" are appealable. 28 U.S.C. § 1291. The impracticality of a rote application of this rule has resulted in three modifications or exceptions to the general rule. The first exception is statutory (28 U.S.C. 1292(b)) and allows the appeal of a truly interlocutory order upon certification by the trial judge and acceptance of the appeal by the Circuit Court. The second exception appears in Rule 54(b) and applies to proceedings in which there are multiple parties and multiple claims. It allows the District Court in its discretion to direct the entry of a final judgment as to one or more but less than all of the parties or claims upon a determination that there is no reason for delay.

Rule 54(b) and 28 U.S.C. § 1292(b) recognize the need for an early appeal in some litigation, but they do not adequately provide for the situation in which the findings or certification required by Rule 54(b) or 28 U.S.C. § 1292(b) may frustrate the aim of the Multidistrict Litigation Act to expedite the disposition of such litigation. Existing procedures under Rule 54(b) and 28 U.S.C. § 1292(b) are inadequate to prevent a situation where, as in the present cases, a single District Judge may in effect require that his single decision be appealed to no less than six different Courts of Appeals. This situation is peculiar to multidistrict litigation, and therefore it is necessary that more workable guidelines for appealability be established than those contained in Rule 54(b) and 28 U.S.C. § 1292(b).

The third exception to the "final decision" rule recognizes the practical aspects of litigation and allows appeals of nominally interlocutory orders on the theory that, in fact, they are final decisions in that if review is delayed until determination is made of all issues in the litigation, no effective review is possible at that time. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); *Swift Co.* v. *Compania Colombiana Del Caribe*, 339 U.S. 684, 70 S. Ct. 861, 94 L. Ed. 1206 (1949); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964). Petitioner submits that these decisions confer jurisdiction upon the Court to issue a writ of certiorari in the present cases.

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), this Court held that appeals lie from lower court decisions which are ". . . in that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action . . ." 337 U.S. at 546. While the *Cohen* decision spoke in terms of appealability of orders that were "separable from, and collateral to" the main litigation, this requirement in the more recent cases appears to have been replaced by "a pragmatic approach to the question of finality" in order to obtain the "just, speedy and inexpensive determination of every action". *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306, 82 S. Ct.. 1502, 1513, 8 L. Ed. 2d 510 (1962); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964); Rule 1, Federal Rules of Civil Procedure, 28 U.S.C.A.

From a pragmatic point of view, there is no doubt whatsoever that the judgments of dismissal entered in these cases by the district court should be reviewed for the following reasons at this time: (1) the ultimate review of the correctness of the transferee court's judgments of dismissal will have to be decided by six separate Circuit Courts of Appeals; (2) if upon review the judgments of dismissal are held to be in error, no effective order can be issued by

the Courts of Appeals after a trial in which the third-party defendant did not participate; (3) no court has yet ruled upon the issue of whether, after a 28 U.S.C. § 1407 transfer, there can be an impleader of a third-party defendant who could not have been impleaded in the transferor court; (4) with the growth of cases subject to transfer under 28 U.S.C. § 1407 it is important to determine the scope of allowable impleader since it may affect the Judicial Panel on Multidistrict Litigation's policy with respect to the situs of transfer; (5) the allowance of the impleader will expedite the litigation in that it will allow all issues to be determined in one trial; (6) LeMay is a proper defendant and third-party defendant in many of the lawsuits, so he will be required to participate, in any event, in all pretrial discovery proceedings; (7) besides these twenty-six cases defendants and third-party defendants Forth Corporation, Brookside Corporation, and Merrill T. McCammack have all filed similar motions in approximately thirty lawsuits, the outcome of which will be affected by the final decision on these appeals; and (8) a review by writ of certiorari at this time will not delay the trial of these actions since petitioner has not requested any stay and all parties are still actively engaged in discovery depositions which are not expected to terminate before the spring of next year.

There is thus present in the instant cases a unique opportunity for this Court to review and state the law and policy considerations concerning issues that will constantly recur in multidistrict litigation proceedings.

2. There is a conflict of opinion between the Court of Appeals and The Judicial Panel on Multidistrict Litigation as to the meaning of "pre-trial proceedings" under 28 U.S.C. § 1407.

In its opinion the United States Court of Appeals for the Seventh Circuit stated:

> "While undoubtedly pretrial proceedings under 28 U.S.C. § 1407 after order of transfer and before remand are subject to early review in the court of appeals for the transferee district at least from the time of transfer until remand, *In re Plumbing Fixtures Cases,* 298 F. Supp. 484, 495 (1968), we are not being asked here to review a 'pretrial proceeding' as that term is contemplated in § 1407." Appendix B, page 41.

It would appear from the foregoing that the Court of Appeals believed it did have jurisdiction to review the instant appeals if in fact the appeals involved "pretrial proceedings." The Court of Appeals, however, did not consider third-party impleader under Rule 14 of the Federal Rules of Civil Procedure to be a "pretrial proceeding" as contemplated in 28 U.S.C. § 1407.

Petitioner submits that this interpretation by the Court of Appeals is contrary to the definition of "pretrial proceedings" stated by The Judicial Panel on Multidistrict Litigation. The Judicial Panel in *In re Plumbing Fixtures Cases* defined the term as used in 28 U.S.C. § 1407 as follows:

> ". . . pretrial, as an adjective, means before trial—that all judicial proceedings before trial are pretrial proceedings." 298 F. Supp. 484, 494 (JPML 1968).

The Judicial Panel has considered Rule 16 and Rule 23 issues (*In re Plumbing Fixtures Cases,* 298 F. Supp. 484 (JPML 1968); Rule 4 and Rule 12 issues (*In re Gypsum Wallboard,* 302 F. Supp. 794 (JPML 1969)), and Rule 56 issues (*In re Butterfield Patent Infringement,* 328 F. Supp. 513 (JPML 1970); Rule 15(e), Rules of The Judicial Panel on Multidistrict Litigation, 50 F.R.D. 203 *et seq.*) all to be within the meaning of "pretrial proceedings" as that term is used in 28 U.S.C. § 1407.

Petitioner submits that if Rules 4, 12, 16, 23 and 56 involve pretrial proceedings, then equally third-party im-

pleader under Rule 14 is a "pretrial proceeding" and therefore the Court of Appeals denied review based upon a misunderstanding of the statute.

In addition, although the Court of Appeals denied review of the instant cases, it did so in such a manner as to indicate serious doubt about the correctness of its decision, and in such a manner that parties to multidistrict proceedings will now be compelled to file protective appeals so that they waive none of their rights. This is evidenced in its opinion wherein the Court of Appeals stated:

> ". . . we recognize the validity of the policy arguments made by Allegheny and indeed the possibility that some courts might find jurisdiction for considering the appeals . . ." Appendix B, page 44.

Based upon this language and the confusion as to what constitutes a "pretrial proceeding" subject to early review in the Court of Appeals for the transferee district, we may now expect a proliferation of appeals from orders entered by transferee courts in multidistrict litigation proceedings.

Now is the time for this Court to give guidance to the appellate courts concerning the reviewability of transferee court orders in multidistrict litigation so that these courts may intelligently pass upon the expected inundation of appeals resulting from the opinion by the Court of Appeals for the Seventh Circuit.

3. The jurisdiction of a transferee court in multidistrict litigation over third-party defendants residing within the territorial limits of that court but outside the limits of the transferor court has never been passed upon and must be upheld in order that the objectives of the Multidistrict Litigation Act may be attained.

The instant cases present a most fundamental question under the Multidistrict Litigation Act (28 U.S.C. § 1407)

because they deal with the determination of the effect of the Act on the territorial jurisdiction of a transferee court. Here, the validity of the service of a third-party complaint is the specific issue, but the general determination of jurisdiction involved is applicable to all the actions a District Court must take when presiding over pretrial proceedings in multidistrict litigation.

Petitioner was unable to serve respondent with its third-party complaints for indemnity and contribution in the transferor courts because respondent was outside their territorial jurisdiction. However, after the transfer to the District Court for the Southern District of Indiana, it did effect proper service on respondent in Indiana, where he resides.

The validity of the service of petitioner's third-party complaints was not passed upon by the Court of Appeals for the Seventh Circuit because it dismissed petitioner's appeals on jurisdictional grounds. The dismissal of the appeals, however, had the effect of sustaining the judgments of the District Court which held that the transferee court in multidistrict litigation proceedings has no greater jurisdiction than the transferor court. Thus, as matters now stand, the United States District Court for the Southern District of Indiana in multidistrict litigation proceedings no longer possesses its own territorial jurisdiction (28 U.S.C. § 94(b)), but only possesses the jurisdiction of the particular transferor court from which the case it is considering at the time was transferred under 28 U.S.C. § 1407.

Petitioner submits that the District Court's decision is incorrect because it deprives a transferee court of its own original territorial jurisdiction; it is in conflict with the purpose of coordinated pretrial proceedings under 28 U.S.C. § 1407; it defeats the purpose of Rule 14 impleader, and it is contrary to the very purpose of the Federal Rules of Civil Procedure.

Rule 1 of the Federal Rules of Civil Procedure provides that the Rules "shall be construed to secure the just, speedy and inexpensive determination of every action". 28 U.S.C.A. Certainly one very important and favored method of accomplishing this end is impleader under Rule 14. As this Court stated in *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 556, 71 S. Ct. 399, 95 L. Ed. 523 (1950):

> "The availability of third-party procedure is intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings."

In spite of this recognized desirability to have all possible litigants before one court and to resolve all possible issues at one trial, the District Court in the instant cases interpreted the Multidistrict Litigation Act so as to deny itself these procedural tools and to deny itself its own statutory jurisdiction as the United States District Court for the Southern District of Indiana.

This unusual holding seriously compromises the effectiveness of the Multidistrict Litigation Act. The Judicial Panel in multidistrict tort litigation has invariably selected as the transferee court the jurisdiction where the accident occurred. *In re Hendersonville, North Carolina, Air Disaster Litigation*, 297 F. Supp. 1039 (JPML 1969); *In re Ardmore, Oklahoma, Air Disaster Litigation*, 295 F. Supp. 45 (JPML 1968); *In re San Juan, Puerto Rico, Air Crash Disaster*, 316 F. Supp. 981 (JPML 1970). One advantage to such a situs is that under modern "long-arm" statutes all possible defendants are usually subject to service of process in the jurisdiction where the tort occurred.

Thus, in the instant cases, the Judicial Panel on Multidistrict Litigation based its transfer of the cases to the District Court for the Southern District of Indiana on, among other things, the presence in Indiana of a potential third-party defendant (the Forth Corporation) when it

stated (*In re Mid-Air Collision near Fairland, Indiana,* 309 F. Supp. 621 (JPML 1970)):

> "Factors favoring the selection of the Southern District of Indiana include . . . (3) the owner of the Piper Cherokee is an Indiana corporation with its principal office in Indianapolis." (at 622)

Of course, the transfer under 28 U.S.C. § 1407 is a change of venue. The major distinction between this change and one under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406(a) is that the change is for the purpose of pretrial proceedings only. However, it has been held by the Judicial Panel that this change of venue terminates the jurisdiction of the transferor court and invokes that of the transferee court. *In re Gypsum Wallboard,* 302 F. Supp. 794 (JPML 1969). There is no concurrent jurisdiction and no reservation of power in the transferor court. The case, after transfer, is pending in the transferee court, and that court only. *In re Plumbing Fixtures Cases,* 298 F. Supp. 484 (JPML 1968).

Thus, the change of venue under 28 U.S.C. § 1407(a) vests exclusive jurisdiction in the transferee court. This is the normal situation whenever there is a change of venue, and the Judicial Panel on Multidistrict Litigation has recognized this by clearly stating that considerations applicable to venue changes under 28 U.S.C. § 1404(a) and 28 U.S.C. § 1406(a) are equally applicable to transfers under 28 U.S.C. § 1407(a). *In re Library Editions of Children's Books,* 299 F. Supp. 1139 (1969).

It should be noted that while the Judicial Panel has equated the various transfer sections noted above it does state in *Children's Books, supra,* that 28 U.S.C. § 1407 is not intended to expand the limits of effective service. Yet it is essential to recognize that this statement does not refer to service in the transferee court; it simply refers to any

alleged deficiencies of service in the transferor court and contains the assurance that a transfer under § 1407(a) will not operate to deprive a defendant of those jurisdictional objections *which he already had* in the transferor court before the transfer. That is, the transfer cannot expand the limits of the territorial jurisdiction of the transferor court, and the statement stands only for that proposition. The issue which is crucial to the instant cases and which was not touched upon by the Judicial Panel is whether the transfer can diminish the jurisdiction of the transferee court.

Since it has been held that considerations applicable to § 1404(a) and § 1406(a) also apply to § 1407(a), it is appropriate to consider the cases interpreting the former to determine what effect a change of venue has on the jurisdiction of a transferee court. All cases discovered indicate that a change of venue has no effect whatsoever. In fact, both 28 U.S.C. § 1404(a) and 28 U.S.C. § 1406(a) have been interpreted to allow a court without jurisdiction over a suit to transfer it to one with jurisdiction for the specific purpose of allowing a party to avail himself of the jurisdiction of the transferee forum. *Goldlawr* v. *Heiman,* 369 U.S. 463, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962); *United States* v. *Berkowitz,* 328 F. 2d 358 (3d Cir. 1964), cert. denied 379 U. S. 821 (1964). So common is the assumption that a change of venue will not affect the jurisdiction of the courts involved that District Courts regularly assign as one reason for allowing a transfer the fact that a defendant will be able to implead third-party defendants not reachable under the jurisdiction of the transferor forum—e.g., *Simpson Timber Co.* v. *Great Salt Lake Minerals & Chemical Corp.,* 296 F. Supp. 243 (D. Ore. 1969); *Koencke* v. *Greyhound Lines, Inc.,* 289 F. Supp. 487 (W.D. Okla. 1968); *Brown* v. *Blidberg Rothchild Co.,* 222 F. Supp. 18 (D. Del. 1963).

The reading of these and numerous other cases demonstrates that the District Court's action in dismissing peti-

tioner's third-party complaints in these cases involves an unusual and novel interpretation of the effect of a change of venue. This action has far-reaching implications for all aspects of the administration of proceedings under the Multidistrict Litigation Act, 28 U.S.C. § 1407. Whether a party can take advantage of a transfer to implead parties intimately related to the main cause of action is a question which affects every assumption and policy behind the Act. Petitioner, therefore, respectfully submits that this Court should grant a writ of certiorari to resolve this question and reverse the decisions of the United States District Court for the Southern District of Indiana and the United States Court of Appeals for the Seventh Circuit in order that the benefits of the Multidistrict Litigation Act will not be circumscribed by an interpretation of the law that is without precedent and goes against all the policies behind multidistrict litigation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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Appendix A

Statutes

28 U.S.C. § 94. Indiana

Indiana is divided into two judicial districts to be known as the Northern and Southern Districts of Indiana.

Southern District

(b) The Southern District comprises four divisions.

(1) The Indianapolis Division comprises the counties of Bartholomew, Boone, Brown, Clinton, Decatur, Delaware, Fayette, Fountain, Franklin, Hamilton, Hancock, Hendricks, Henry, Howard, Johnson, Madison, Marion, Monroe, Montgomery, Morgan, Randolph, Rush, Shelby, Tipton, Union, and Wayne.

Court for the Indianapolis Division shall be held at Indianapolis.

(2) The Terre Haute Division comprises the counties of Clay, Greene, Knox, Owen, Parke, Putnam, Sullivan, Vermilion, and Vigo.

Court for the Terre Haute Division shall be held at Terre Haute.

(3) The Evansville Division comprises the counties of Davies, Dubois, Gibson, Martin, Perry, Pike, Posey, Spencer, Vanderburgh, and Warrick.

Court for the Evansville Division shall be held at Evansville.

(4) The New Albany Division comprises the counties of Clark, Crawford, Dearborn, Floyd, Harrison, Jackson, Jefferson, Jennings, Lawrence, Ohio,

Orange, Ripley, Scott, Switzerland, and Washington.

Court for the New Albany Division shall be held at New Albany.

As amended Feb. 10, 1954, c. 6, § 2(b)(7), 68 Stat. 11.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

28 U.S.C. § 1292. Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub.L. 85-919, 72 Stat. 1770.

Appendix A

28 U.S.C. § 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. § 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel,

a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's

order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel

denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

Added Pub.L. 90-296, § 1, Apr. 29, 1968, 82 Stat. 109.

Federal Rules of Civil Procedure—Rule 14. Third-Party Practice

(a) **When Defendant May Bring in Third Party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants

as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(b) **When Plaintiff May Bring in Third Party.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) **Admiralty and Maritime Claims.** When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or

otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff. As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

Federal Rules of Civil Procedure—Rule 54. Judgments; Costs

(b) **Judgment upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action whether as a claim, counterclaim, crossclaim, or third-party claim or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as of any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Appendix B

Judgment of the District Court Dismissing Third-Party Actions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 69-C-431*

JILL MARY KOHR, Executrix of the Estate of Robert H. Kohr, Deceased,

Plaintiff,

v.

ALLEGHENY AIRLINES, INC. and UNITED STATES OF AMERICA,

Defendants.

AND THE PERTINENT RELATED CASES BEING CAUSE NUMBERS:

IP-70-C-120	IP 70-C-179	IP 70-C-456
IP 70-C-133	IP 70-C-252	IP 70-C-209
IP 70-C-134	IP 70-C-277	IP 70-C-429
IP 70-C-135	IP 70-C-407	IP 70-C-455
IP 70-C-136	IP 70-C-408	IP 70-C-234
IP 70-C-137	IP 70-C-547	IP 70-C-276
IP 70-C-138	IP 70-C-601	IP 70-C-385
IP 70-C-178	IP 70-C-141	IP 70-C-443
	IP 70-C-142	IP 70-C-626

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* This Cause Number IP 69-C-431 is not involved in this ruling. It is included in the caption because it is the earliest filed action originating in this jurisdiction and all papers are included in it in the consolidated discovery proceedings.

Appendix B

ENTRY AND JUDGMENT DISMISSING
THIRD-PARTY ACTIONS

The matters of the third-party defendant's, Lee LeMay, administrator of the estate of Robert W. Carey, deceased, motions to dismiss each of the third-party complaints of the third-party plaintiff, Allegheny Airlines, Inc., filed in the pertinent related cases referred to in the caption, and the request of the third-party plaintiff for a determination under Rule 54(b) and Rule 58 of the Federal Rules of Civil Procedure authorizing interlocutory appeals of an adverse ruling to it upon such motions to dismiss pursuant to Title 28 U.S.C. Section 1292(b), came on for rulings by the Court. Heretofore, on September 18, 1970, an indicated ruling on motions then filed was made in open Court which ruling was not finalized. The Court also has before it for action the October 30, 1970 motion of Allegheny Airlines, Inc. to reconsider the indicated ruling. The parties stipulated the evidence. The Court being advised in the matters does now submit its rulings.

The motions are based on the following grounds:

"1. The court in which the action is now pending lacks jurisdiction over the person of this defendant.

2. Service of the summons and third-party complaint on this defendant was insufficient service of process because it was made beyond the territorial limits of effective service applicable to the court where this action is now pending.

3. The third-party complaint fails to state a claim upon which relief can be granted."

The supporting brief filed June 30, 1970 of the moving party explains ground one (1) of the motion as follows:

"* * *.

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Defendant LeMay contends that the transfer of these cases by the Judicial Panel on Multidistrict Litigation to Indiana pursuant to 28 U.S.C.A. § 1407 for coordinated or consolidated pretrial proceedings has not in any way enlarged the jurisdiction of the transferor court where they were originally commenced, or the transferee court. Because LeMay is not subject to service of process in any jurisdiction other than Indiana, he cannot be made a third-party defendant in cases commenced outside this state simply because those cases are transferred here for pretrial discovery. Otherwise, defendant LeMay would be forced to stand trial in numerous foreign jurisdictions when these cases are all remanded for trial to the courts where they were originally filed.

Defendant agrees this court has complete jurisdiction over the various parties for all pretrial proceedings in those cases transferred here under section 1407 (28 U.S.C.A. § 1407), but only after defendants have been served properly. There is no dispute that a transferee court under section 1407 has complete jurisdiction to rule on class action determinations, summary judgment and motions to dismiss for lack of jurisdiction.

* * *"

The Court concludes that ground one (1) of the motion is procedurally proper to raise the question of venue under Title 28 U.S.C.A. Section 1391(a) and (b) and to raise the question of improper service of process under Rule 4 of the Federal Rules of Civil Procedure.

The unquestioned facts are that the pertinent captioned actions were duly transferred to this Court pursuant to Title 28 U.S.C.A. Section 1407. All of the actions are for

damages to the estates or survivors of part of the passengers in an airplane operated by the defendant, Allegheny Airlines, Inc., who died as a result of a mid-air collision between the common carrier's plane and a private plane operated by Robert W. Carey on September 9, 1969 near Fairland, Shelby County, in the State of Indiana. Mr. Carey died as a result of the collision. He was a citizen and resident of the State of Indiana and the moving party, Lee LeMay, was duly appointed by the Probate Court of Marion County, Indiana, as the administrator of Mr. Carey's estate. All of the plaintiffs and their decedents were and/or are citizens of states other than Indiana and citizens of the states where the actions were commenced. The defendant, Allegheny Airlines, Inc., at all times pertinent to the motion was a citizen of the State of Indiana. The jurisdiction of the Court in the plaintiffs' actions against Allegheny Airlines, Inc. is laid upon diversity of citizenship. The jurisdiction of the Court is also pendant to but not dependent upon the claims of plaintiffs against the defendant, United States of America, under the Tort Claims Act. After the commencement of the actions and transfer to this Court under Title 28 U.S.C.A. Section 1407, the defendant, Allegheny Airlines, Inc., as a third-party plaintiff, caused a summons and complaint to be served upon Lee LeMay, as administrator of the estate of Mr. Carey, deceased, pursuant to Rule 14 of the Federal Rules of Civil Procedure, who was not then a party to the actions. The third-party complaint claims that the estate is liable to Allegheny Airlines, Inc. for all of the claims of the plaintiffs in the pertinent actions against Allegheny Airlines, Inc. upon the theory of indemnity and contribution. The transferor courts of the actions in which the third-party actions were filed were all more than one hundred (100) miles of where the third-party defendant could be served, except those of the Ohio Court.

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The third-party defendant in open Court consented to the overruling of the motion in the cases transferred from the United States District Court for the Southern District of Ohio.

Based upon the foregoing facts, the Court concludes:

The Court has jurisdiction, as the transferee Court under Title 28 U.S.C.A. Section 1407, to rule upon the motions to dismiss the third-party actions of the third-party defendant, Lee LeMay, as administrator of the estate of Robert W. Carey, deceased, in all of the pertinent actions.

The third-party defendant's motions to dismiss the third-party actions filed in the eighteen (18) Cause Numbers IP 70-C-143 through IP 70-C-158, IP 70-C-317 and IP 70-C-389 were withdrawn and/or admittedly unmeritorious by the third-party defendant.

The claim of the third-party plaintiff against the third-party defendant is ancillary for jurisdiction purposes and no independent jurisdictional ground is needed to support adjudication. The third-party defendant had no right to the venue objection based on Title 28 U.S.C.A. Section 1391 when the actions were filed and pending in the jurisdictions of the transferor courts. *United States of America* v. *Acord* (CA 10th, 1954) 209 F.2d 709 cert. den. 347 U.S. 975, *Lesnik* v. *Public Industrials Corp.* (CA 2d 1944) 144 F.2d 968. It follows that the right to a venue objection cannot be made in the transferee Court. The actions under Title 28 U.S.C.A. Section 1407 are still pending in the jurisdiction of the transferor courts. The actions are pending in the transferee courts for the limited purposes of Title 28 U.S.C.A. Section 1407.

The transferor courts in the pertinent actions did not have the jurisdiction or authority to cause service of process upon the third-party defendant in the third-party actions filed in the transferee Court nor would they have

such power if the proceedings had been first filed in the transferor courts. The jurisdiction of the transferor courts is limited by Congress under Rule 4(f) of the Federal Rules of Civil Procedure to the service of process of not more than one hundred (100) miles from the place where the action was commenced. See *Nortown Steel Supply Co.* v. *Northern Indiana Steel Supply, Inc.* (CA 7th, 1965) 340 F.2d 934.

The actions were not transferred to the jurisdiction of the transferee Court for the trial and certainly such transfer under Title 28 U.S.C.A. Section 1407 cannot be construed as the place of commencement of the actions within the meaning of Rule 4(f) of the Federal Rules of Civil Procedure. This Court as the transferee Court was without the ability to effectively cause service of process on the third-party defendant over one hundred (100) miles from the transferor courts as the actions are still pending in those judisdictions where such actions were commenced and where such actions will be tried. The venue transfer under Title 28 U.S.C.A. Section 1407 is for a limited purpose and does not include the purpose of trial.

The Court does not reach the third (3rd) ground of the motions.

JUDGMENT

It is ADJUDGED that the third-party defendant's, Lee LeMay, as administrator of the estate of Robert W. Carey, deceased, motions to dismiss the third-party actions of Allegheny Airlines, Inc. filed in the eighteen (18) cause numbers here identified by cause numbers assigned by this Court IP 70-C-143 through IP 70-C-158, IP 70-C-317 and IP 70-C-389, have been voluntarily withdrawn and waive any objection to the venue of such actions in the United States District Court for the Southern District of Ohio

and waive any objection to the service of process and/or otherwise they each are OVERRULED.

It is ADJUDGED that the third-party defendant's, Lee LeMay, as administrator of the estate of Robert W. Carey, deceased, motions to dismiss the twenty-six (26) third-party actions of Allegheny Airlines, Inc. filed in the following list of Courts and identified by cause numbers assigned by this Court:

COURT	CAUSE NUMBER
United States District Court for the Southern District of West Virginia	IP 70-C-120
United States District Court for the Northern District of Illinois	IP-70-C-133 IP 70-C-134 IP 70-C-135 IP 70-C-136 IP 70-C 137 IP 70-C-138 IP 70-C-178 IP 70-C-179 IP 70-C-252 IP 70-C-277 IP 70-C-407 IP 70-C-408 IP 70-C-547 IP 70-C-601
United States District Court for the District of Connecticut	IP 70-C-141 IP 70-C-142 IP 70-C-456
United States District Court for the Eastern District of New York	IP 70-C-209 IP 70-C-429
United States District Court for the Northern District of New York	IP 70-C-455

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Court	Cause Number
United States District Court for the Eastern District of Tennessee	IP 70-C-234
United States District Court for the Eastern District of Kentucky	IP 70-C-276
United States District Court for the Eastern District of Missouri	IP 70-C-385 IP 70-C-443
United States District Court for the District of New Jersey	IP 70-C-626

be and they are hereby Sustained and the third-party complaints and actions be and they are hereby Dismissed Without Prejudice.

It is also Adjudged that the issues of the October 30, 1970 motion by Allegheny Airlines, Inc. for a reconsideration of the Court's ruling of September 18, 1970, granting LeMay's motion to dismiss Allegheny's third-party complaints are rendered Moot by the foregoing rulings.

Dated this 18 day of November, 1970.

Cale J. Holder
Cale J. Holder, Judge, United States District Court Southern District of Indiana

Appendix B

Judgment of the District Court Denying Request for Immediate Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 69-C-431

JILL MARY KOHR, Executrix of the Estate of Robert H. Kohr, Deceased,

Plaintiff,

v.

ALLEGHENY AIRLINES, INC. and UNITED STATES OF AMERICA,

Defendants.

AND THE PERTINENT RELATED CASES BEING CAUSE NUMBERS:

IP-70-C-120	IP 70-C-179	IP 70-C-456
IP 70-C-133	IP 70-C-252	IP 70-C-209
IP 70-C-134	IP 70-C-277	IP 70-C-429
IP 70-C-135	IP 70-C-407	IP 70-C-455
IP 70-C-136	IP 70-C-408	IP 70-C-234
IP 70-C-137	IP 70-C-547	IP 70-C-276
IP 70-C-138	IP 70-C-601	IP 70-C-385
IP 70-C-178	IP 70-C-141	IP 70-C-443
	IP 70-C-142	IP 70-C-626

Appendix B

ENTRY DENYING REQUEST FOR IMMEDIATE APPEAL

The matter of the request of the third-party plaintiff, Allegheny Airlines, Inc., in the captioned pertinent related cases for a determination under Rule 54(b) and Rule 58 of the Federal Rules of Civil Procedure and Title 28 U.S.C.A. Section 1292(b) authorizing an interlocutory appeal or an appeal from a judgment on less than all of the claims pending in such actions, came on for ruling. The Court being advised in the matter does now submit its ruling.

The Court has this date in a separate entry SUSTAINED motions to dismiss the third-party complaints in the captioned pertinent related cases and DISMISSED the third-party complaint and action.

The Court judicially notices that the issue of liability for the occurrence is present in the case of Lee LeMay, as administrator of the estate of Robert W. Carey, deceased, commenced and pending in this Court as Cause Number IP 70-C-492 wherein LeMay is plaintiff and Allegheny Airlines, Inc. and United States of America are defendants. Allegheny Airlines, Inc. in this action has filed a counterclaim seeking property damages for its plane. Thus, liability between the parties as participants in the occurrence can be resolved between them without requiring a decedent's estate to undergo the expense of appearing in twenty-six (26) cases in eight (8) different jurisdictions to participate in the defense of the main actions against Allegheny Airlines, Inc. and the United States of America. Including the twenty-nine (29) cases commenced and now pending in this Court and the eighteen (18) commenced in the United States District Court for the Southern District of Ohio with a potential additional eleven (11) cases that could be filed for a total of eighty-four (84) actions in ten (10) different Courts the third-party defendant is subjected to a quantity of

litigation and potential litigation. The parties are benefiting from discovery in other related cases. The issues of the fact and legal questions involved in the third-party complaint dealing with indemnity and contribution will substantially delay the litigation. The third-party action is an ancillary proceeding and does not involve a controlling question of law in the twenty-six (26) main actions. The issue of fact and law present in the rulings on the motions to dismiss the third-party complaints in the twenty-six (26) actions does involve a controlling question as to the maintaining of such actions. While the issue is new, that is no published decision has pointed the way, yet, there can be no substantial ground for difference of opinion to warrant an immediate appeal from the judgment. Counsel should now be fully engaged in discovery in these cases and the added efforts of appeals of rulings in twenty-six (26) cases will diminish and delay the work product of a massive case.

It is ADJUDGED that the request for an order for an immediate appeal from this judgment as authorized by Title 28 U.S.C.A. Section 1292(b) and Rule 54(b) and Rule 58 of the Federal Rules of Civil Procedure be and is hereby DENIED.

Dated this 18 day of November, 1970.

CALE J. HOLDER
Cale J. Holder, Judge, United States District Court Southern District of Indiana

Appendix B

Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970—APRIL SESSION, 1971

Nos. 71-1034
thru 71-1059

ALLEGHENY AIRLINES, INC.,
Third-Party Plaintiff-Appellant,

vs.

LEE LEMAY, as Administrator of Estate of Robert W. Carey, Deceased.
Third-Party Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

July 2, 1971

Before SWYGERT, *Chief Judge,* KERNER and PELL, *Circuit Judges.*

PER CURIAM. This matter, which is now before the court on its own motion, arises from litigation following a mid-air collision near Fairland, Indiana on September 9, 1969, between a jet plane of Allegheny Airlines, Inc. (Allegheny) and a small plane piloted by Robert W. Carey, who is the decedent of Lee LeMay, administrator (LeMay).

Subsequent to the accident, some 70 plus suits were filed in various district courts throughout the United States.

On February 10, 1970, the Judicial Panel on Multidistrict Litigation transferred all of the actions to the United States District Court for the Southern District of Indiana, in which some of the actions were already pending pursuant to 28 U.S.C. § 1407(a) for pretrial proceedings. *In re Mid-Air Collision Near Fairland, Indiana,* 309 F. Supp. 621 (J.P.M.L. 1970).

After the transfer of the cases to the Southern District of Indiana, Allegheny, a defendant in the cases, served upon LeMay pursuant to Rule 14, Fed. R. Civ. P., a summons and third-party complaint seeking indemnity and contribution in each of the twenty-six cases here on appeal. LeMay had been a party in some of the actions but not in any of the actions involved in the appeals before us. LeMay was a citizen and resident of the State of Indiana and not subject to suit in the transferor forums involved in the cases from which these purported appeals arise.

arise.

In the district court LeMay moved to dismiss the third-party complaints. The motions were sustained and the third-party complaints dismissed by the district court "without prejudice". On the same day that the order of dismissal was entered, a separate order denied Allegheny's alternative motion for requisite findings and entry of partial final judgment under Rule 54(b), Fed. R. Civ. P., or for certification of the question for immediate appeal pursuant to 28 U.S.C. § 1292(b).

Timely notices of appeal were filed in the district court from the "entry and judgment dismissing third-party actions" in each case in which said judgment had been entered.

By order of this court the twenty-six appeals were consolidated. Subsequently, LeMay filed a motion to dismiss

the appeals as did six of the plaintiffs in the action below.

As to both the plaintiffs so moving and as to LeMay, this court has heretofore ordered that said motions to dismiss were denied "without prejudice to the parties' rights to raise the same issues in their briefs and on oral argument". Subsequently this court entered an order on its own motion that it had taken the motions to dismiss under advisement by way of reconsideration and that no further briefs would be received until the court ruled on the motions to dismiss which were then under reconsideration.

As to the six plaintiffs, it is our opinion that while they may have some justifiable concern with respect to the retardation effect of the present proceeding on the progress of their lawsuit, they nevertheless have no standing in this court for the purpose of filing motions to dismiss the appeal. *See Richmond* v. *Town of Largo,* 127 F.2d 264 (5th Cir. 1942); *Cramp Shipbuilding Co.* v. *United States,* 195 F.2d 848 (3rd Cir. 1952); *Empire Seafoods, Inc.* v. *Anderson,* 398 F.2d 204, 216-18 (5th Cir. 1968). Accordingly, the motions of the plaintiffs to dismiss the appeal, which heretofore were denied without prejudice, are upon reconsideration now denied. Such ruling would not preclude the plaintiffs from filing an appropriate motion for leave to file a brief amicus curiae pursuant to Rule 29, Fed. R. App. P.

LeMay, of course, has standing as a party in the third-party complaint procedure and we now turn to his motion to dismiss.

The question before us is jurisdictional. This court under 28 U.S.C. § 1291 has jurisdiction of appeals from ". . . all final decisions of the district courts of the United States. . . ." The question then is whether the entry of the district court was a final judgment or whether there is some exception to § 1291 which would permit us to entertain the present appeals. We find no basis for so doing.

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A Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351 (1961), deals extensively with the questions before us.

In the type of situation here involved, the principal bases which would provide jurisdiction to this court would be found either in Rule 54(b), Fed. R. Civ. P., or in 28 U.S.C. § 1292(b). While Allegheny has attempted to cloak itself with appellant apparel by the district court's denial, it comes to us without the garment so necessary for review.

In *Panichella* v. *Pennsylvania R.R. Co.*, 252 F.2d 452 (3d Cir. 1958), in which a third-party procedure had been involved in the appeal, the court discussed the policy reasons for not entertaining an appeal and, even though there the district court had entered an order pursuant to Rule 54(b), found in reversing that such action was not a proper exercise of discretion. See also *Luckenbach Steamship Co.* v. *H. Muchlstein & Co.*, 280 F.2d 755 (2d Cir. 1960); *Sierra* v. *Merchants Mutual Casualty Co.*, 262 F.2d 287 (1st Cir. 1958); and *Weisstock Hermanos and Cia Ltd.* v. *American Airline and Extract Company*, 406 F.2d 1327 (3d Cir. 1969).

Aside from the underlying policy against piecemeal appeals and aside from the practical aspect that an appeal on a third-party claim at this stage would serve to delay the trial of the principal claims, the most persuasive argument against entertaining the present appeals is found in the statement in 75 Harv. L. Rev. 351, *supra*, dealing with orders subject to Rule 54(b) but also applicable in principle to 28 U.S.C. 1292(b), at 362:

> "[Abuse of the district court's discretion of a finding of finality] is likely to be found . . . where the order may be rendered moot by the subsequent course of the litigation, as in the case of a dismissal of the defendant's claim against an impleaded party before the defendant has been found liable to the plaintiff."

Here, if LeMay had been successfully impleaded, he would have had to participate in the trial of twenty-six cases in eight different jurisdictions other than the Southern District of Indiana. If Allegheny successfully asserts a defense to the main action, then the participation by LeMay would have been fruitless and unnecessary. The third-party action against LeMay is only in a non-moot status if judgment is obtained against Allegheny who then must prove its right either to indemnity or contribution.

Allegheny concedes that it was the intention of the district court that there be no immediate appeal but in effect contends that policy reasons in the context of modern concepts of multidistrict litigation and the underlying purpose of third-party procedure to avoid duplication of litigation should be the basis for our assuming appellate jurisdiction.

From the point of view of legality, Allegheny contends: (a) appealability is not to be decided by rote, *Horizons Titanium Corp.* v *Norton Co.*, 290 F.2d 421, 423 (1st Cir. 1961); (b) finality should not be construed so as to deny effective review of a claim fairly severable[1] from the context of a larger litigious process, *Swift & Co.* v. *Compania Colombiana*, 339 U.S. 684, 688-89 (1950); (c) finality should be given a practical, not technical, construction and there should be a balancing of the costs of piecemeal review with denial of justice to the would-be appellant by delay,[2] *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-53 (1964) and (d) a dismissal "without prejudice" does not preclude appeal, *Blair* v. *Cleveland Twist Drill Co.*, 197 F.2d 842, 845 (7th Cir. 1952).

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[1] Of course, LeMay, backed by the district court, would scarcely concede that the claim was fairly severable.

[2] Plaintiffs here may, and apparently do, have some feeling regarding damage to them by the delay of an appeal.

Appendix B

While it is not entirely clear whether the "without prejudice" refers to no bar being imposed upon a refiling of the third-party complaint or merely that the matter is left open for the district court on appropriate motion or on its own motion to reconsider its action of dismissal, nevertheless the words are more than merely suggestive of a lack of finality.

Allegheny appears to be contending that once the cases are returned to the transferor districts, no effective review of the judgment of dismissal can be obtained and therefore the judgment is final as to it on the basis of the authorities hereinbefore cited. If Allegheny means that this particular judgment of dismissal would not return as a part of the "package" to the transferor district so that the dismissal as well as the judgment in the primary action could not then be appealed to the appropriate court of appeals, we cannot agree.

It would appear to us that final judgment of all aspects of the case would be effected in the jurisdiction where it is ultimately disposed of irrespective of its interim travels. While undoubtedly pretrial proceedings under 28 U.S.C. § 1407 after order of transfer and before remand are subject to early review in the court of appeals for the transferee district, at least from the time of transfer until remand, *In Re Plumbing Fixture Cases,* 298 F.Supp. 484, 495 (1968), we are not being asked here to review a "pretrial proceeding" as that term is contemplated in § 1407.

The Judicial Panel on Multidistrict Litigation in *In Re Plumbing Fixtures Cases, supra,* made a comparison of the present situation to the rules prevailing on change of venue and stated at page 495:

> "On change of venue the overwhelming authority holds that the jurisdiction and powers of the transferee court are coextensive with that of the transferor

court; that the transferee court may make any order to [sic] render any judgment that might have been rendered by the transferor court in the absence of transfer. 92 C.J.S. Venue § 207 pp. 980-981 and cases therein cited, cf. *Greve* v. *Gibraltar Enterprises* (D.N.M.), 85 F. Supp. 410 l.c. 414; that after an order changing venue the jurisdiction of the transferor court ceases; and that thereafter the transferor court can issue no further orders, and any steps taken by it are of no effect. *Phebus* v. *Search* (C.A. 8) 264 F. 407, l.c. 409; 21 C.J.S. Courts § 517a; 20 Am.Jur.2d § 149; 56 Am.Jur. Venue, § 78, p. 79. These principles are applicable to a transfer under Section 1407 from the time of entry of the order of transfer until the time of entry of an order of remand."

It is to be noted in the cases before us that the transferee district court was in fact being asked to render an order broader in scope than could have been rendered by the transferor court inasmuch as the transferor court could not have conceivably exercised jurisdiction over LeMay, he being a non-resident.

The question of the error, if any, in the dismissal of the third-party complaints will be subject to review in our opinion at the time of the entry of judgment on the complaints in the suits in the ultimate trial forum.

We approve of the language contained in 92 C.J.S. Venue § 207, p. 981:

"A change of venue does not deprive any party of a legal right. It does not vacate any of the proceedings taken in the cause before the change was granted. The parties are not required to file new pleadings, nor may the court to which the change is taken amend the record of the court from which the cause is brought, or allow an exception to its action. It may,

however, reconsider a previous ruling in the cause, vacate it, and make a modified or contrary ruling."

The transferor court when the case is returned to it is, in our opinion, in the position of a third court on a second change of venue and takes the case with all of its errors, if any, that may have fastened on the carcase theretofore.

A third situation in addition to 28 U.S.C. § 1292(b) and Rule 52(b) (sic) is found in what has been categorized as collateral orders. *See* 75 Harv. L. Rev. 364, *supra.* The case often cited for this principle is *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

If there were any basis for appellate review of the consolidated appeals before us, it would seem to lie in the collateral-orders doctrine, which as suggested by 75 Harv. L. Rev. 351, 366 appears to mask what is in fact the exercise of appellate court discretion over interlocutory appeals. In judging the propriety of an immediate appeal, the various interpretations of the collateral-orders doctrine have weighed a number of considerations against the appellant's claimed hardship: appellate court burden, the undesirability of reviewing decisions before all the circumstances are known and the evils of trial court delay. *Id.*

Allegheny claims hardship in deferral of adjudication of its claim for indemnity or contribution but the district court apparently balanced the hardship of LeMay, who would have had to defend this claim in a number of jurisdictions in various parts of the country. Allegheny asserts over and above the hardship matter, however, certain policy reasons for our accepting jurisdiction: (a) The issue whether, after a section 1407 transfer, there can be an impleader of a third-party defendant who could not have been impleaded in the transferor court has never been ruled on; (b) with a growth of cases subject to transfer under section 1407 it is important to determine the scope

of allowable impleader since it may affect the Judicial Panel policy with respect to transfer situs; (c) the allowance of the impleader will expedite the litigation in that it will allow all issues to be determined in one trial; (d) LeMay is actually a proper defendant or third-party defendant in many of the lawsuits so in any event he will be required to participate in all pretrial discovery proceedings since they are now being handled in one district court; and (e) appeal will not delay the action since the trial dates do not seem likely until the fall of 1971. Allegheny also contends that no party will be prejudiced by appellate review at this time. However, we do not find the source of this assertion other than the conjecture there will be no delay and that LeMay has to participate in the cases where he is properly a party.

Allegheny cites to us *Carter Products Inc.* v. *Eversharp, Inc.*, 360 F.2d 868 (7th Cir. 1966), and *Williams* v. *Bernhardt Bros. Tugboat Service Inc.*, 357 F.2d 883 (7th Cir. 1966), as being authority for our accepting jurisdiction notwithstanding *Winsor* v. *Daumit*, 179 F.2d 475 (7th Cir. 1950). *Carter* appears to us to be an exemplification of the collateral-orders doctrine and we find in most of the cases founding jurisdiction on that doctrine that the word "collateral" has more than a passing significance. There will be in these cases "no duplication of appellate court effort since the same evidence will not be relevant to the disputed order and to the claim for relief," 75 Harv. L. Rev., *supra*, at p. 365.

While we recognize the validity of the policy arguments made by Allegheny and indeed the possibility that some courts might find jurisdiction for considering the appeals, we believe the better principle is that interlocutory orders should, with the exception of truly collateral orders, be subject to the controls of Rule 52(b) (sic) and 28 U.S.C. § 1292(b). In other words, we are not prepared to find that we have some inherent power of certiorari.

Appendix B

We recognize the correctness of the statement in *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 491, 511 (1950):

> "The liberalization of our practice to allow more issues and parties to be joined in one action and to expand the privilege of intervention by those not originally parties has increased the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had."

Nevertheless, the answer we feel is found in the next sentence of the Supreme Court following the above quotation, "In recognition of this difficulty, present Rule 54(b), Federal Rules of Civil Procedure, was promulgated."

Thus, it seems to us that the broadening of the scope of appellate review in the interlocutory area is a matter not for our determination but for that of Congressional action or attention of rule making bodies and advisory committees. The procedures have been provided by both Congress and Federal Rules of Civil Procedure. The note at 75 Harv. L. Rev. 351, 382, *supra,* suggests that a wrongful refusal to certify by the district court should be a ground for seeking mandamus although the courts of appeal have shown no interest thus far in mandamus to compel certification. No doubt this extraordinary writ will continue to be very sparingly used in disturbing the discretion exercised by the district court but on the other hand there may well be appropriate cases justifying this extraordinary remedy. *See Fink* v. *Igoe,* 279 F.2d 544 (7th Cir. 1960).

Here, however, we find no reason for disturbing the discretionary ruling of the district court and if Allegheny's position is correct it will have to be established by an ap-

peal from the final judgments entered in the cases before us at the time of their ultimate disposition. Accordingly, the orders of the district court are affirmed.

A True Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.